

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

DARRYL L. HUSS)	
Claimant)	
VS.)	
)	Docket No. 1,049,583
ADVANCED PLUMBING & HEATING)	
Respondent)	
AND)	
)	
ACCIDENT FUND NATIONAL INSURANCE)	
Insurance Carrier)	

ORDER

Claimant requests review of the September 20, 2011¹ Award by Special Administrative Law Judge (SALJ) Jerry Shelor. The Board heard oral argument on December 1, 2011.

APPEARANCES

Mark E. Kolich, of Lenexa, Kansas, appeared for claimant. Brent M. Johnston, of Kansas City, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The Board has considered the record and adopts the stipulations enumerated in the Award.

ISSUES

The SALJ found that the last act necessary to form the contract of employment between claimant and respondent occurred in Missouri and that therefore this claim is not

¹ A Nunc Pro Tunc Order was issued on September 23, 2011 to correct clerical errors.

covered under the Kansas Workers Compensation Act (Act). The SALJ denied compensation² and did not address the other issues raised by the parties.

Claimant argues that although he was injured in Missouri and his principal place of employment was in Missouri, his contract of employment was formed in Kansas, thereby conferring jurisdiction under the Act. Claimant requests that the Award be reversed and remanded for the determination of the other issues in the claim.

Respondent argues that the Award should be affirmed because the last act necessary to form the contract of employment between claimant and respondent occurred in St. Joseph, Missouri, and that the claim is accordingly not covered under the Act. In the alternative, respondent argues that the Board lacks personal jurisdiction over respondent pursuant to the Kansas Long Arm Statute.³

FINDINGS OF FACT

The parties stipulated that claimant met with personal injury by accident in Buchanan County, Missouri on October 20, 2009. Claimant was age forty-one at the time of his regular hearing testimony on April 5, 2011. The parties also agree, that claimant's principal place of employment was in Missouri.

Claimant testified that he secured employment with respondent through his union, the Plumbers and Pipefitters, Local 45, located in St. Joseph, Missouri. Claimant's initial contact with the union occurred when Gary Silvey, a representative of the union, came to claimant's voc tech class in Atchison, Kansas⁴ seeking students interested in joining the union. Claimant testified that he was interested and put in his name for union membership. He was thereafter asked to come in for an interview with the union in St. Joseph, Missouri. The interview was likely with the joint apprenticeship committee. A few weeks after his interview, claimant was contacted by Mr. Silvey via telephone to let him know that he was accepted into the union and to inquire if claimant was interested in an available apprentice position with respondent. Claimant responded in the affirmative.⁵ At the time of claimant's acceptance of Mr. Silvey's proposal, claimant was in Atchison, Kansas. He didn't know where Mr. Silvey was calling from but assumed it was from the union hall in Missouri.

² Technically the ALJ's finding of no coverage under the Kansas Act should have resulted in a dismissal of the claim rather than a denial of compensation. For purposes of this review, the Board will consider the ALJ's Award a dismissal of the claim for lack of jurisdiction.

³ See K.S.A. 60-308(b).

⁴ Claimant attended school from August 2007 to May 2008.

⁵ R.H. Trans. at 15-16.

Claimant believes his contract of employment with respondent was made in that telephone conversation with Mr. Silvey.

Following his telephone discussion with Mr. Silvey, claimant gave his employer at the time one week's notice that he was quitting. Claimant began working for respondent on June 30, 2008. Claimant testified that on June 30, 2008, before he reported to work for respondent at 8:00 a.m., he first went to a medical clinic for a drug screen arranged by the joint apprenticeship committee. He then reported to the union hall. Both the medical clinic and the union hall are located in St. Joseph, Missouri. Although claimant already knew that he was going to work for respondent, he had to complete paperwork at the union office. That paperwork related to claimant's union membership and included insurance documents. The claimant then went to respondent in St. Joseph, Missouri and met with Mike Hanlan, the owner and president of respondent. The two talked and claimant filled out some tax forms, following which he was immediately put to work. Mr. Hanlan testified that he had no discussion with claimant prior to the time claimant went to work.

Gary Silvey is the business manager for Local 45 of the Plumbers and Pipefitters Union in St. Joseph, Missouri. He testified that his job is to take care of the day-to-day operations of the local union, fill work orders, administer any grievances, handle anything that has to do with contracts, and administer the benefit fund.⁶

Mr. Silvey testified that the purpose of the union is to provide representation and secure employment for its members.⁷ He testified that the members of the union are currently under a collective bargaining agreement⁸ with Advanced Plumbing & Heating and other employers engaged in that line of work. The agreement applies to both journeymen and apprentices.

Mr. Silvey testified that, under the collective bargaining agreement, the process of handling union apprentices is the responsibility of joint apprenticeship committee. That committee is comprised of both union members and representatives of the employers subject to the agreement. The joint apprenticeship committee receives applications from potential apprentices, interviews applicants, and determines which of those applicants will be asked to join the union as apprentices. The joint apprenticeship committee maintains a list of union apprentices who are qualified to be sent out to work for individual employers such as respondent.

Mr. Silvey testified that when an employer needs an apprentice they communicate that need to the joint apprenticeship committee. The employers subject to the collective

⁶ Silvey Depo. at 3-4.

⁷ *Id.* at 4.

⁸ *Id.*, Ex. 1; Hanlan Depo., Ex. 1.

bargaining agreement must secure apprentices, as well as journeymen, from members of the union. When an employer makes a request for an apprentice the committee determines if the employer meets the requirement to receive an apprentice; if so, then Mr. Silvey picks the next apprentice on the list and contacts the potential hire to inquire if they are interested in the available apprenticeship position. If they are selected they go to a medical clinic for a drug screen and report to the union office and fill out paperwork. The apprentices are provided with a job referral and sent to the employer to fill out some more papers and then they are put to work.⁹ The employer does have the right to refuse the person who is sent to them.¹⁰ Mr. Silvey testified that the union doesn't hire anyone; they simply select potential apprentices for employers to hire or reject.¹¹

The collective bargaining agreement provides that "[t]he Employer shall be the sole judge of the qualifications of all applicants and retains the right to reject any applicant for employment referred by the Union."¹² Mr. Silvey has been with the union for a period exceeding ten years and in that time he has not seen any applicant rejected by an employer.

PRINCIPLES OF LAW AND ANALYSIS

A claimant in a workers compensation claim has the burden of proof to establish by a preponderance of the credible evidence the right to an award of compensation and to prove the various conditions on which his or her right depends.¹³

K.S.A. 44-506 provides in relevant part:

The workmen's compensation act shall apply also to injuries sustained outside the state where: (1) The principal place of employment is within the state; or (2) the contract of employment was made within the state, unless such contract otherwise specifically provides: . . .¹⁴

⁹ *Id.* at 6.

¹⁰ *Id.* at 9, Hanlan Depo. at 5.

¹¹ *Id.* at 20.

¹² *Id.*, Ex. 1, section 19(f)(5)(a).

¹³ K.S.A. 44-501(a); K.S.A. 44-508(g); *Perez v. IBP, Inc.*, 16 Kan. App.2d 277, 278-79, 826 P.2d 520 (1991).

¹⁴ K.S.A. 44-506.

In *Shehane*,¹⁵ the Kansas Court of Appeals held:

The basic principle is that a contract is “made” when and where the last act necessary for its formation is done. *Smith v. McBride & Dehmer Construction Co.*, 216 Kan. 76, 530 P.2d 1222 (1975). When that act is the acceptance of an offer during a telephone conversation, the contract is “made” where the acceptor speaks his or her acceptance. *Morrison v. Hurst Drilling Co.*, 212 Kan. 706, Syl. ¶ 1, 512 P.2d 438 (1973).

ANALYSIS

It is undisputed that claimant's injury occurred in Missouri and that claimant's principal place of employment was in Missouri. Accordingly, under K.S.A. 44-506, there is no jurisdiction under the Kansas Act unless the claimant successfully establishes that the contract of employment between himself and respondent was made within the state of Kansas.

The Board finds that the contract of employment was made in Missouri and that there is no jurisdiction under the Act. Claimant contends that the union business manager, Gary Silvey, made an offer of employment in Mr. Silvey's telephone conversation with claimant wherein both claimant's union membership and his employment with respondent were discussed. There are Kansas appellate opinions which construe acceptances spoken by an employee by telephone to offers of employment made by agents of the employer to be “made” where the employee speaks the acceptance.¹⁶ However, other cases hold that the last act necessary to form the contract of employment was the employee's reporting to the work site and thereby presenting himself for work.¹⁷

The preponderance of the credible evidence does not establish that Mr. Silvey had sufficient authority to bind respondent to a contract of employment. Clearly, much of the preliminary matters relating to the employment of apprentices was delegated to the joint apprenticeship committee, such as deciding to whom union membership would be offered, conducting interviews with perspective apprentice applicants, and maintaining the list of applicants qualified to be referred to employers. However, the undisputed evidence from the testimony of Mr. Silvey and Mr. Hanlan, as well as from the collective bargaining agreement itself, was that the employer was ultimately the sole judge of an applicant's qualifications and the employer retained the right to reject any applicant provided by the

¹⁵ *Shehane v. Station Casino*, 27 Kan. App. 2d 257, 261, 3 P.3d 551 (2000).

¹⁶ See, e.g., *Hartigan v. Babcock & Wilcox Co.*, 191 Kan. 331, 380 P.2d 383 (1963); *Pearson v. Electric Service Co.*, 166 Kan. 300, 201 P.2d 643 (1949).

¹⁷ See, e.g., *Smith v. McBride & Dehmer Construction Co.*, 216 Kan. 76, 530 P.2d 1222 (1975); *Davis v. Jacob Dole Packing Co.*, 140 Kan. 644, 38 P.2d 107 (1934).

union. Mr. Silvey did not have authority to offer a job on behalf of respondent, nor did he have authority to accept the acceptance verbalized by claimant. As Mr. Silvey testified, when he calls an apprentice in response to a request from the employer, the applicant knows “. . . they have the potential of being hired.”¹⁸

Because Mr. Silvey did not have authority to make an offer of employment which would have a binding effect on respondent, the last act necessary to form the contract of employment was claimant's reporting to work for respondent in St. Joseph, Missouri on June 30, 2008, and the act of respondent in putting claimant to work. Accordingly, the contract of employment was not made within the state of Kansas and there is no jurisdiction under the Kansas Act.

Both parties discuss a prior decision of the Board, *Branch*.¹⁹ Although the *Branch* opinion appears to involve very similar circumstances as this claim, the opinion does not set forth the facts in any detail. Hence, the *Branch* opinion is of limited usefulness in resolving the coverage issue in this claim. Moreover, each claim involving where a contract of employment was made obviously depends on the facts of each individual claim and, as such, reliance on the outcomes of prior claims may not be of significant assistance.

The other issue raised by respondent merits little discussion. No authority was cited by respondent to support the notion that the Kansas Long Arm statute is applicable to workers compensation claims. Even if it is assumed arguendo that the statute is applicable to this proceeding, the undisputed evidence is that respondent does business in Kansas by hiring Kansas employees and by performing some of its work in Kansas. Moreover, the collective bargaining agreement to which respondent is a party applies, by its own terms, to counties in both Kansas and Missouri.

CONCLUSION

The Board is persuaded by a preponderance of the credible evidence that the contract of employment between claimant and respondent was made in Missouri and that this claim is not covered by the Kansas Workers Compensation Act.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Special Administrative Law Judge Jerry Shelor dated September 20, 2011 and the Nunc Pro Tunc Order dated September 23, 2011, are affirmed in all respects.

¹⁸ Silvey Depo. at 9.

¹⁹ *Branch v. Vaughn Mechanical, Inc.*, No. 205,588, 1996 WL 96670 (Kan. WCAB Feb. 19, 1996).

IT IS SO ORDERED.

Dated this _____ day of December 2011.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Mark E. Kolich, Attorney for Claimant
Brent M. Johnston, Attorney for Respondent and its Insurance Carrier
Jerry Shelor, Special Administrative Law Judge
Marcia Yates Roberts, Administrative Law Judge